



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 25, 1996

Ms. Lan P. Nguyen
Assistant City Attorney
City of Houston
Legal Department
P.O. Box 1562
Houston, Texas 77251-1562

OR96-1935

Dear Ms. Nguyen:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 101381.

The City of Houston (the "city") received an open records request for certain records that you contend may be withheld from the public pursuant to the Open Records Act, sections 552.103(a) and 552.101 of the Government Code. You have submitted Exhibits 4 and 6 for our review the documents which you assert are responsive to the request. Additionally, the same requestor asked for further information subsequent to your submission of Exhibits 4 and 6 to this office. Information which you represent as responsive to his subsequent request has been forwarded to this office as Exhibit 4-A and you contend the document may also be withheld from the public pursuant to section 552.103(a). We combine both separate requests in this open records ruling.

We note that Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." In this context the Texas courts long have recognized the informer's privilege *see Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). Additionally, the informer's privilege is a well-established exception under the Open Records Act. Open Records Decision No. 549 (1990) at 4.

Although the "informer's privilege" aspect of section 552.101 ordinarily applies to the efforts of law enforcement agencies, it can apply to administrative officials with a duty of enforcing particular laws. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 285 (1981) at 1, 279 (1981) at 1-2; *see also* Open Records Decision No. 208 (1978) at 1-2. This may include enforcement of quasi-criminal civil laws. *See* Open Records Decision Nos. 515 (1988) at 3, 391 (1983) at 3. The informer's privilege serves to encourage

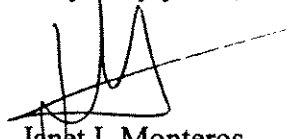
the flow of information to the government by protecting the identity of the informer, but only to the extent necessary to protect the informer's identity. Open Records Decision No. 549 (1990) at 5. However, once the identity of the informant is know to the subject of the communication, as it is know to the requestor, the exception is no longer applicable. Open Records Decision No. 202 (1978) at 2. The document dated December 21, 1994 as Exhibit 6 should be released.

In order to secure the protection of section 552.103(a), the city must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 551 (1990). The city has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex.App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. The city must meet both prongs of this test for information to be excepted under section 552.103(a).

You have submitted a copy of the pleading filed in federal court in which the city is a named party in the lawsuit, thus meeting the first prong of the section 552.103 test. We have reviewed the remaining documents at issue and conclude that you have met the second prong, showing that Exhibit 4 and Exhibit 4-A relate to the pending litigation. Accordingly, Exhibits 4 and 4-A may be withheld.¹

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Very truly yours,



Janet I. Monteros
Assistant Attorney General
Open Records Division

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¹In reaching this conclusion, however, we assume that the opposing party to the litigation has not previously had access to the records at issue; absent special circumstances, once information has been obtained by all parties to the litigation, e.g., through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). If the opposing parties in the litigation have seen or had access to any of the information in these records, there would be no justification for now withholding that information from the requestor pursuant to section 552.103(a).

Ref.: ID# 101381

Enclosures: Submitted documents

cc: Mr. Raphael C. Igbokwe
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(w/o enclosures)